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No. 157

In the Supreme Court of the United States

OCTOBER TERM, 1968

DOUGLAS HOUSTON AND JOHN LEWIS SIMPSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions Presented	2
Statement	2
Argument	8
Conclusion	14

CITATIONS

Cases:	
Carroll v. *United States*, 267 U.S. 132	13
Donahue v. *United States*, 56 F. 2d 94	11
Giordenello v. *United States*, 357 U.S. 480	11
Harris v. *United States*, 331 U.S. 145	13
Jones v. *United States*, 362 U.S. 257	9
King v. *United States*, 282 F. 2d 398	9
McCray v. *Illinois*, 386 U.S. 300	13
Preston v. *United States*, 376 U.S. 364	13
Roviaro v. *United States*, 353 U.S. 53	13
Rugendorf v. *United States*, 376 U.S. 528	9, 13
United States v. *Jones*, 294 F. 2d 745, certiorari denied, 346 U.S. 854	11
United States v. *Kaplan*, 286 Fed. 963	9
United States v. *Rabinowitz*, 339 U.S. 56	11, 13
United States v. *Ventresca*, 380 U.S. 102	9
Williams v. *United States*, 273 F. 2d 781, certiorari denied, 362 U.S. 951	11
Statutes and rules:	
18 U.S.C. 4208(a)(2)	2
26 U.S.C. 5205(a)(2)	2
26 U.S.C. 5604(a)(1)	2
Federal Rules of Criminal Procedure:	
Rule 36	9
Rule 41(c)	9
Rule 52(a)	13

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OPINIONS BELOW

The opinions of the district court (Pet. App. 17–20, 67–71) are not reported. Except to state its conclusion that the contentions of the petitioners were without merit (Pet. App. 75), the court of appeals wrote no opinion.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1968 (Pet. App. 75). The petition for a writ of certiorari was filed on June 4, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly ruled, after holding invalid the search warrant pursuant to which the contraband whiskey was seized, that the seizures were valid independently of the warrant.

2. Whether the government was required to divulge the identity of the informant whose information led to the investigation, arrests, and seizures, where the government agents verified the accuracy of the information through personal surveillance.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioners were convicted of possessing nontaxpaid whiskey, in violation of 26 U.S.C. 5205(a)(2) and 5604(a)(1) (Pet. App. 11, 13). On September 21, 1967, petitioner Houston was sentenced to five years' imprisonment and to pay a fine of $1,000 and petitioner Simpson was sentenced to one year's imprisonment and to pay a fine of $500 (Pet. App. 12).[1] The court of appeals affirmed (Pet. App. 75).

Shortly after 7 o'clock on the evening of March 11, 1967, petitioners were arrested for possessing nontaxpaid whiskey as they were backing a 1950 GMC pickup truck out of a driveway separating petitioner Houston's residence (located at 405 Welbourne Street, in Johnson City, Tennessee) from an adjacent vacant lot (No. 407), which was owned by a person not a

[1] Pursuant to 18 U.S.C. 4208(a)(2), it was directed that each petitioner should become eligible for parole at such time as the Board of Parole should deem appropriate (Pet. App. 12).

party to these proceedings (Pet. App. 22–24, 57–59; H. 7–8, 11–12, 90–91; Tr. 52–53).[2] The arresting officers were two agents of the Tennessee Alcoholic Beverage Commission (Robert Rhea and Ernest Thacker) and two federal Internal Revenue agents (James Beeler and William Lindsey), acting jointly (H. 25). The officers' information which led to the arrests is described below. Within a few minutes of the arrests 20½ gallons of nontaxpaid whiskey, packaged in half-gallon "Ball Mason" glass jars, were seized by the officers from the bed and cab of the truck (H. 8–9; Tr. 65). An additional 80¼ gallons were seized moments later from a shed located between 35 and 40 yards from the Houston residence, in the rear portion of a lot adjacent to, and on the opposite side of, the vacant lot next to the Houston residence. Petitioners were known to have had regular access to the shed during the preceding four days (see *infra*), and petitioner Houston had a key to the shed in his possession when he was arrested (H. 9–12; Tr. 66).

At the time of the arrests and seizures the officers had in their possession a federal search warrant, issued earlier that day, authorizing the search, for nontaxpaid whiskey, of the "Douglas Houston residence, 405 Welborne Street, * * * and adjacent premises, and particularly a white wood shed approximately thirty-five yards to the right rear of said residence" (Pet. App. 15; H. 37–38, 90–93). In a pre-trial pro-

[2] "H." refers to the transcript of the hearing on a pre-trial motion to suppress, held on April 21, 1967. "Tr." refers to the transcript of the trial proceedings.

ceeding to suppress the use of the seized whiskey as evidence, the district court held the search warrant invalid because the name of the affiant on whose affidavit it had been issued had, through a clerical error, been omitted from the face of the warrant (Pet. App. 17–20).[3] Following an evidentiary hearing, however, the court ruled that the arrests had been valid and the seizures lawful as reasonable incidents of the arrests, and therefore denied the motion to suppress (Pet. App. 67–71).

The relevant facts are not in dispute and may be summarized as follows:

The investigation which led to the arrests and seizures was a joint undertaking of the federal and State agencies involved (Pet. App. 67). On March 6, 1967, an informant of known reliability told State Agent Curtis Combs that he believed petitioners were concealing nontaxpaid whiskey in a shed near the house of petitioner Houston (H. 61–66, 74, 81–82).[4] Both petitioners had reputations as dealers in the contraband commodity (H. 22–23, 38–39, 70–71).[5] The agents

[3] Because it held the warrant defective on this ground, the court found it unnecessary to consider other challenges which had been made to the warrant's validity (Pet. App. 14–15, 20).

[4] In the period of some four years during which Federal Agent Beeler (through whom Combs had met the informant) had known him, the informant had, on approximately ten occasions, supplied information—relating principally to the locations of illicit stills—which proved to be correct (H. 62, 81–82).

[5] Agent Beeler, who had known Houston for ten years and Simpson for one year, testified that throughout the respective periods they had had the reputation of being both wholesalers and retailers of moonshine (H. 22–23). Agent Combs knew petitioners by reputation as being "associated in the whiskey business in a big way" (H. 70–71).

thereupon initiated a cooperative surveillance of the suspected premises, from the third floor of an office building located 30 feet from and to the rear of the yard of the Houston residence, at about dusk on five consecutive evenings (H. 29–37, 66–67).

At 6:55 p.m. on March 7, 1967, the first day of the surveillance, the agents observed petitioners go to a shed answering the description of the shed referred to in the warrant, unlock the door, enter, and carry out a number of cardboard cartons on the sides of which the words "Ball Mason Jars" were imprinted. They placed the cartons in a 1950 GMC pickup truck that was parked in the vacant lot next to the residence. Petitioner Simpson then removed from the shed and placed in the cab of the truck a large paper bag containing something which appeared to be heavy. After Houston had locked the shed door, both petitioners departed from the premises in the truck (H. 31–32, 35). "Ball Mason" fruit jars are the customary containers of moonshine whiskey in Eastern Tennessee and they are customarily protected from breakage by being packed in heavy paper bags (Pet. App. 68, n. 2; H. 23, 71).

On March 8, at 7:10 p.m., the agents saw petitioners again unlock and enter the shed. Each removed a similarly labeled cardboard carton which appeared to be heavy, placed it in the bed of the GMC truck, and departed in the truck. At 7:30 p.m. the two returned in the truck, unloaded some heavy and similarly marked cartons, and left again. At 8 p.m. they returned, loaded the cartons back into the truck, and departed (H. 32–34).

Similar activity was observed on the evenings of March 9 and 10 (H. 35–37, 74–75). In one instance, a carton which petitioner Simpson removed from the shed and placed in a parked automobile had an open top and the agents could see the glass lids of Mason jars in the carton (H. 36, 74–75). On another occasion, petitioners and the driver of a Ford automobile, which was driven into and parked on the vacant lot, unloaded 19 cartons and some paper bags from the vehicle. Petitioners later loaded four of the cartons into the GMC truck, in which they then departed (H. 37).

During the course of the foregoing activities of petitioners, the agents noticed that whenever an automobile passed by or a pedestrian approached on the street petitioners would "hunker down" with the cartons behind some tree limbs that lay in the vacant lot. On one occasion, when a person came out of a house on the other side of the street as petitioner Simpson was loading a case into the GMC truck, Simpson "just leaned up against the truck like he was standing there" (H. 73).

On the afternoon of March 11, 1967, State Agent Rhea, one of the surveillant officers, appeared before a United States Commissioner and executed an affidavit for a search warrant, based on his observations (H. 37–38, 52–53, 94).[6] The warrant to which we referred earlier was issued. At 6:55 p.m. Agent Combs, from the observation post from which the surveil-

[6] The affidavit is not contained among the record papers on file in the Clerk's office.

lances of the four prior evenings had been made, saw petitioners remove from the shed and place in the bed of the GMC truck two cardboard cartons similar in appearance to those earlier observed. A third such carton and a large paper bag that appeared to be filled with something were placed in the cab of the truck. When petitioners got into the truck and started to leave, Combs radioed the information and the signal "Go" to the four arresting agents, who, armed with the search warrant, had been standing by, awaiting the signal, two blocks from the premises being watched (H. 25–26, 39, 67–69, 95–96). The agents thereupon drove to the premises and the arrests of petitioners immediately followed.

As the agents leaped from their automobile to effect the arrests, the federal agents shouted their identities as "federal officers." The two cartons marked "Ball Mason Jars," which petitioners had just placed in the bed of the truck, were visible to the officers as they rounded the truck's rear end and proceeded toward the cab of the vehicle, where petitioners were (H. 8, 14–15, 39–40, 90). The State agents were the first to reach petitioners and it was they who made the physical apprehensions (H. 14–15, 79). Federal Agent Beeler had custody of the search warrant (H. 91, 95–96). For a period of three to five minutes following the arrests, the further performance by the officers of their duties was interrupted by some teen-age youngsters who, unaware of the officers' official identities and thinking that they had no business on the premises sought to interfere (H. 92–94). When, through

petitioner Houston's cooperation, the youths had been induced to leave, Agent Beeler advised petitioners that he had a federal search warrant and told Houston that he would give him a copy of it as soon as the search had been completed (H. 91, 93). The cartons in the bed of the truck—which apparently had not been opened up to this point—were then opened and their liquid contents, when found to be nontaxpaid whiskey, seized. The carton and the bag in the cab of the truck, which the officers had seen there when petitioners were apprehended, were opened at about the same time, and their contents, upon proving to be whiskey, were similarly confiscated (H. 8–9, 40, 91–92; Tr. 53, 65).

Using a key that had been removed from a pocket of petitioner Houston during a search of his person which had immediately followed his arrest, the officers then opened the locked door of the shed described in the warrant and found therein the additional whiskey to which reference has been made (H. 9–10; Tr. 66).

In his return to the search warrant, Agent Beeler listed all of the whiskey as having been seized pursuant to the warrant (Pet. App. 15–16; H. 27–28). Beeler testified at the hearing that the reason for his presence at the time and scene of the arrests was to serve the search warrant (H. 90, 91, 92) and arrest the petitioners (H. 90).

ARGUMENT

1. The district court properly denied the motion to suppress.

We question the court's ruling that the search warrant was invalid.[7] But, even assuming the warrant's invalidity, the searches and seizures were nevertheless valid.

[7] The ruling was based solely on the fact that the name of the maker of the supporting affidavit was, through a clerical error, omitted from the face of the warrant. But where, as here, the identity of the affiant is a matter of record, the affidavit itself is on file, and the affiant is available for interrogation by the court and counsel in the event that any question arises as to the affidavit's veracity or the existence of probable cause, it is not apparent how the inadvertent omission of the maker's name from the warrant is prejudicial. Cf. *Jones* v. *United States*, 362 U.S. 257, 270–272 (affiant may rely on unnamed informant's information if substantial basis exists for crediting it); *Rugendorf* v. *United States*, 376 U.S. 528, 533 (same; informant's identity need not be divulged in suppression proceeding). And see *United States* v. *Ventresca*, 380 U.S. 102 (affidavit supporting warrant should not be read stintingly). *King* v. *United States*, 282 F. 2d 398 (C.A. 4), on which the district court relied (Pet. App. 18), involved a warrant the affidavit for which had been made by one who had falsely represented her identity; the *dicta* in the opinion on which the district court apparently relied must be read in the light of that manifestly distinguishing fact. In *United States* v. *Kaplan*, 286 Fed. 963 (S.D. Ga.)—the only other decision cited (Pet. App. 18–20)—the court declared, in general terms, that a search warrant must state the names of the affiants (at 966 and 970), but the precise issue before the court to which the generalization was relevant does not appear from the opinion. It is true that Rule 41(c) of the Federal Rules of Criminal Procedure provides that the search warrant "shall state * * * the names of the persons whose affidavits have been taken in support thereof." However, at least where no prejudice is demonstrable or readily imaginable, sound construction would appear to require that, despite the normally mandatory "shall," the prescription be viewed as merely directory. Rule 36 provides that "Clerical mistakes in judgments, orders or other parts of the record and *errors in the*

Conceding *arguendo* that the officers' prime purpose in entering onto the Houston premises on the evening of the raid was to execute the search warrant, the existence of that purpose was not incompatible with a second objective—to arrest petitioners in the act of transporting nontaxpaid whiskey. Indeed, the record compels the conclusion that the officers had both objectives in mind. The coexistence of the two purposes is the evident reason why the officers delayed their entry onto the premises until, by the signal received from their fellow agent at the surveillance post, they knew petitioners were about to depart from the premises with a shipment of what the officers had every reason to believe was contraband whiskey.

Since the officers had clear probable cause for believing, immediately prior to the arrests, that petitioners had a shipment of nontaxpaid whiskey in their truck, the district court was correct in concluding that the arrests were lawful and that the search for and seizure of the whiskey were justified as lawful incidents of the arrests,[8] notwithstanding that the officers

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record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders" (emphasis added). The clerical oversight involved in this case would appear reasonably to be subject to that Rule. Candor requires us to acknowledge, however, that, although the government vigorously opposed petitioners' challenge to the warrant in the pleadings, it conceded the correctness of the court's judgment holding the warrant invalid after the decision had been rendered (Pet. App. 21).

[8] Petitioners' statement that it is "obvious * * * that there would have been no arrest had the search not been fruitful" (Pet. 5) is contradicted by the record. The record clearly establishes that the arrests preceded the search both of the truck and of the shed.

might have believed that in effecting the search and seizure they were engaged primarily in executing the search warrant. *Williams* v. *United States,* 273 F. 2d 781, 789–795 (C.A. 9), certiorari denied, 362 U.S. 951; *United States* v. *Jones,* 204 F. 2d 745, 747–748 (C.A. 7), certiorari denied, 346 U.S. 854; *Donahue* v. *United States,* 56 F. 2d 94, 97 (C.A. 9).[9] In the *Donahue* case, involving the seizure of a still in a dwelling house, the validity of the seizure depended on whether the officers entered the house to arrest the operator of a still known to be there and incidentally seized the still (valid) or whether they entered solely to search for a still (invalid). The court said (56 F. 2d at 97):

> The fact that the officers intended when they entered the premises to make a search of the premises for a still would not make the arrest illegal, if when they entered they were justified in so doing for the purpose of making the arrest which they did in fact make. Nor do we think that the failure of the officers, in their testimony, to assign as the purpose of their entry the making of the arrest, makes the arrest illegal. Nor does their statement that they intended to search for a still, if the fact justified it, necessarily eliminate the conclusion that they also intended to make the arrest when they entered the premises.

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[9] Compare *United States* v. *Rabinowitz,* 339 U.S. 56, 60 (arrest pursuant to warrant upheld because, though warrant may have been defective, officers had probable cause to believe felony was being committed in their presence); *Giordenello* v. *United States,* 357 U.S. 480, 488 (evidence held erroneously admitted because seized incidentally to arrest under invalid warrant; "This is not to say, however, that in the event of a new trial the Government may not seek to justify petitioner's arrest without relying on the warrant").

> It is familiar law that it is presumed that one intends to do that which he in fact does do. Therefore it is clear that the officers intended to make an arrest * * *.

This conclusion is fortified by the fact that the search warrant did not, at least specifically, authorize the search of the truck. The warrant directed search of the Houston residence "and adjacent premises". While the agents may well have thought that this clause of the warrant gave them authority to search the truck—because the truck was *on* premises so describable when it was intercepted and brought to a stop—ordinarily a movable vehicle is not considered a part of the premises on which it happens at a given moment to be.

Inasmuch as the shed was some distance from the point at which the arrests occurred [10] and the search of the structure occurred after the truck's search and required that the shed first be unlocked, justification of that search as an incident of the arrests is admittedly a more problematical matter.[11] We submit there is no need to attempt it. The search of the shed—a small outbuilding which was obviously no one's dwelling and hence was not subject to the strict safeguards that have historically been associated with that type of structure—was independently justifiable as inherently

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[10] The record indicates the distance to have been between 25 and 30 feet (H. 22).

[11] The more so, perhaps, for the very reason that the warrant specifically designated the shed for search. There can be no doubt from the record that the agents understood, in searching the shed, that they were executing the search warrant.

reasonable in the light of the agents' knowledge of the use to which petitioners were putting it, gleaned from five successive evenings of surveillance.[12] In any event, even if the search of the shed were deemed illegal, the fact would be immaterial: For the admission in evidence of the contraband found in the shed—because it provided merely cumulative evidence of guilt—was at most harmless error. See Rule 52(a), Fed. R. Crim. P.

2. There is no merit to petitioners' claim (Pet. 7–9) that they were entitled to know the identity of the agents' confidential informant. Particularly where, as here, the government agents personally verified the accuracy of the informant's information through surveillance, there is no necessity, in determining whether the agents had probable cause to make the arrests and conduct the searches, for the government to disclose the identity of its confidential source. Cf. *McCray* v. *Illinois*, 386 U.S. 300, 305–314; and see *Rugendorf* v. *United States*, 376 U.S. 528, 533.[13]

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[12] It is of course settled that only unreasonable searches and seizures are proscribed by the Fourth Amendment. *Preston* v. *United States*, 376 U.S. 364, 366–367; *United States* v. *Rabinowitz*, 339 U.S. 56, 60; *Harris* v. *United States*, 331 U.S. 145, 150; *Carroll* v. *United States*, 267 U.S. 132, 147. The rule permitting searches incident to valid arrests is but an application of that general principle. *Harris* v. *United States*, *supra*, at 150–152.

[13] Since the informant did not participate in the activities which constituted the offense, disclosure of his identity was of course not required under the principle of *Roviaro* v. *United States*, 353 U.S. 53. Cf. *Rugendorf* v. *United States*, *supra*, at 534–536.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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